APPEAL NO. 020591
FILED APRIL 12, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on January 10, 2002, the hearing officer concluded that the appellant (claimant) is not entitled to lifetime income benefits (LIBs). The claimant has appealed this determination on evidentiary sufficiency grounds and also states that the findings do not specifically address the elements enunciated in Travelers Insurance Company v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962). The respondent (carrier) urges the sufficiency of the evidence and of the findings to support the dispositive conclusion.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a spinal injury on _____; that he underwent three spinal surgeries, the last being the implantation of a spinal cord stimulator; and that he received a 17% impairment rating. A statement was made on the record that he had received supplemental income benefits for all quarters. The claimant testified that he is 65 years of age; that he lives alone and tends to his daily living activities; that he drives his car only for short distances and calls upon relatives for longer drives; that he walks out of his house each day to retrieve the newspaper; that he cannot walk very far without using his walker; and that he cannot sit or stand for very long. In evidence was a surveillance videotape of certain activities of the claimant on multiple dates in September and November 2001. The claimant is shown standing and bending over to water flowers; walking on his front lawn to retrieve the newspaper; walking up and down his front porch steps to go out to relatives' vehicles in the driveway; and carrying his walker and putting it in the vehicles. The claimant testified that whenever he did walk as depicted on the videotapes, he had to lay down in the house afterwards. He also indicated that the walking activities captured on the videotape were rare events, happening on "good days," and that most of his days were "bad days."

The hearing officer found that the claimant "can walk with a walker at a minimum"; that "subsequent to his injury, the claimant has been able to walk without assistance and to perform the normal activities of living"; that the claimant "can use his feet and legs to perform the normal activities of a workman as of the date of the [hearing]"; and, in Finding of Fact No. 5, that the claimant "is not paralyzed as a result of the compensable injury nor has he suffered a loss of use of his legs equivalent to an amputation."

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We are satisfied that the factual findings, which are sufficient to support the dispositive legal conclusion, are not so against

the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

As for the legal adequacy of the findings, the 1989 Act provides for LIBs in Section 408.161. At the outset of the hearing, the claimant seemed to indicate that he was proceeding on two theories of entitlement, namely, Section 408.161(a)(2) providing for loss of both feet at or above the ankle, and Section 408.161(a)(5) providing for an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg. The legal standard for determining "loss" under Section 408.161 is set out in Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, and Texas Workers' Compensation Commission Appeal No. 941065, decided September 21, 1994. These cases discuss the application of the two-prong test set out in Seabolt, *supra*, for "loss" under Section 408.161. As stated in Appeal No. 941065, "'total loss of use' of a member of the body exists whenever by reason of injury such member no longer possesses any substantial utility as a member of the body or the condition of the injured member is such that the worker cannot get and keep employment requiring the use of such member." This test is in the disjunctive so only one prong need be proven. While Finding of Fact No. 5 suggests that the hearing officer does not have an appreciation of the so-called Seabolt test of loss of use of a member of the body, we are satisfied that the remaining findings are legally sufficient and adequately support the dispositive conclusion.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge